

No. 15858.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR EARL MCKNIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

ROBERT H. GREEN,

1212 Spring Arcade Building,
541 South Spring Street,
Los Angeles 13, California,

Attorney for Appellant.

FILED

APR 14 1958

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

	PAGE
Preliminary statement	1
Statement of facts and appellant's contentions.....	2
(a) The findings and conclusions of law.....	2
Argument	4

I.

The lower court committed reversible error in determining and finding that the Veterans Administrator suffered a loss in the sum of \$1,453.64.....	4
---	---

II.

The action by the appellee is a proceeding for a deficiency judgment and by reason thereof is barred by the provisions of Section 580(b) of the Code of Civil Procedure of Cali- fornia	7
Conclusion	9

TABLE OF AUTHORITIES CITED

CASES	PAGE
Board of Supervisors v. Simpson, 36 Cal. 2d 671.....	7
Diamond v. Willett, 37 So. 2d 338.....	5
Lathrop, Haskins & Co., In re, 216 Fed. 102.....	5, 6
Lidderdale v. Robinson, 2 Brock 159.....	8
Waldrip v. Black, 74 Cal. 409, 16 Pac. 226.....	8
Wilton-Maxfield Management Co., In re, 117 F. 2d 913.....	9

RULES AND REGULATIONS

Federal Rules of Civil Procedure, Rule 76.....	1
38 Code of Federal Regulations (1946), Sec. 4323(e).....	3, 6

STATUTES

Code of Civil Procedure, Sec. 580(b).....	8, 9
Government Code, Sec. 14.....	7
United States Code Annotated, Title 38, Sec. 636.....	7
United States Code Annotated, Title 38, Sec. 693.....	5
United States Code Annotated, Title 38, Sec. 694(g).....	6, 7

TEXTBOOK

23 California Jurisprudence, p. 917	7, 8
---	------

No. 15858.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR EARL MCKNIGHT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

The appellant Arthur Earl McKnight has appealed from a judgment entered on May 23, 1957, in favor of appellee United States of America in the sum of \$2,027.57.

The appeal is being presented on a settled statement of the case, pursuant to Rule 76 of the Federal Rules of Civil Procedure.

Preliminary Statement.

The appellant, a veteran of World War II, applied for a loan to the Porterville Mutual Building and Loan Association of Porterville, California, and was granted said loan and secured the same for the sole purpose of buying a home. The appellee United States of America guaranteed 50 percent of said loan under the Servicemen's Readjustment Act of 1944.

The appellant defaulted on his note, and the lending agency foreclosed the trust deed. Following the default and foreclosure, the lending agency made a claim upon the appellee by virtue of the Servicemen's Readjustment Act of 1944. The entire controversy concerns the liability, if any, of the veteran to the appellee after the payment made by the appellee to the lending agency.

Statement of Facts and Appellant's Contentions.

The facts appear in the Findings of Fact as set forth in the Transcript of the Record, pages 9 to 14.

The Conclusions of Law appear in the Transcript of the Record, pages 14 to 15.

A reversal of the judgment is necessary, for the lower court made erroneous findings of fact and conclusions of law; the lower court erroneously refused to admit competent, relevant and material evidence and rejected the appellant's offer of proof; the lower court erroneously determined that this was not an action for a deficiency judgment, and as such would be barred under the law of California.

(a) The Findings and Conclusions of Law.

The findings and conclusions of law are erroneous, because legally there was no loss to the appellee. This is true because the appellee took title to the property and resold it to a private person, which wiped out any loss that might be claimed by the appellee, except the sum of \$415.62. This will hereinafter be shown in detail, and the findings and conclusions examined at length, but, basically, it is as follows:

(1) The lower court determined that following the claim of the lender to the appellee the appellee paid the

lender \$3,375.00, which, after sale of the property, the sum of \$1,921.36 was credited to the defendant, resulting in a net loss to the appellee in the sum of \$1,453.64 [Finding of Fact No. 14, Tr. of the Rec. p. 14].

(2) The lower court concluded that by reason of said fact the appellee suffered a loss, at all times, of \$1,453.64, and by reason of the Code of Federal Regulations (1946 Supp.), Title 38, Section 4323, Paragraph (e), the appellant became liable to indemnify the appellee for any loss suffered [Conclusions of Law 3 and 4, Tr. of the Rec. p. 15].

The situation is one where under a veteran's guaranteed loan and following a default by the veteran the lender has made a claim upon the appellee for payment of the loan. The payment is made, the lender sells the property at an upset price established by the appellee, the appellee credits the veteran with the excess sum of the sale over the guaranteed portion of the loan and attempts to recover judgment against the veteran for the so-called "loss" suffered by the appellee. The whole fallacy with the lower court's judgment and conclusions of law is that there is in reality no "loss" because the lender has the right of conveying the property to the appellee, and did so convey it. The appellee may then sell the property and wipe out any "loss" that may have existed.

The exact situation is present in the case at bar, and the argument will show why a reversal is required in order to conform to the law.

ARGUMENT.

I.

The Lower Court Committed Reversible Error in Determining and Finding That the Veterans Administrator Suffered a Loss in the Sum of \$1,453.64.

(The judgment added \$522.03 interest to this principal sum and \$41.90 costs, making a total of \$2,027.57.)

Following the default of the note by the appellant and the foreclosure of the trust deed by the lender and the payment of the claim by the appellee to the lender, the Veterans Administrator acquired the subject property in its own name. The total cost of acquisition of the property was \$7,047.50.

Shortly thereafter, the Veterans Administrator sold the property for a gross price of \$6,850.00, which, after all payment of commissions and fees, resulted in the sum of \$6,631.88 to the Veterans Administrator. The only loss, if any, suffered by the Veterans Administrator was the difference in the cost of acquisition and the amount received at the sale. This amounts to \$415.62.

In the District Court of the United States, the aforementioned facts concerning the cost of acquisition of the property and the amount received at the sale were stipulated to as true by the appellee, but the evidence was rejected by the District Court on the grounds that the same were incompetent, irrelevant and immaterial to the issues [Tr. of the Rec. pp. 5 and 6].

The basis for the judgment for the appellee is in Conclusions of Law Nos. 3 and 4, wherein the lower court concluded that the Veterans Administrator paid out, suffered a loss of and at all times thereafter continued to

suffer a loss of the sum of \$1,453.64. *The simple facts show this is not true.* It needs no citation of authority to show that the Veterans Administrator would not be entitled to make a profit upon the default by a veteran of his family home. The very purpose of the Serviceman's Readjustment Act of 1944 was to aid the returning veteran in the readjustment of his normal family life. Title 38, U. S. C. A., Section 693, is designed to give relief to members of the armed forces of limited means who honorably served their country during World War II (*Diamond v. Willett* (La. App., 1948), 37 So. 2d 338).

Separately from the foregoing and independent of said ground, in Conclusion of Law No. 4 the lower court concluded that pursuant to the Code of Federal Regulations (1946 Supp.), the appellant became liable to indemnify the Veterans Administrator for any loss under the Servicemen's Readjustment Act of 1944.

In this regard, the lower court completely and erroneously misapplied the law, both as to the measure of damages and the law of indemnity. Under the law of indemnity, the only damage to the appellee would be the net loss suffered. The net loss suffered would be the difference between the cost of acquisition of the property and the amount received from the sale.

In *In re Lathrop, Haskins & Co.*, 216 Fed. 102, the United States Court of Appeals correctly states the measure of damages for a contract of indemnity as follows:

“ . . . the measure of damages in contracts of indemnity is not the amount of liability incurred, but the amount actually paid by the person indemnified on account of the loss. See *Central Trust Co. v. Louisville Trust Co.*, 100 Fed. 545, 546, 40 C.

C. A. 530, 531 (1900); the court through Mr. Justice Lurton, after citing *Wicker v. Hoppock*, 6 Wall. 94, 18 L. Ed. 752 (1867), *Mills v. Dows*, 133 U. S. 424, 10 Sup. Ct. 413, 33 L. Ed. 717 (1890), and *Johnson v. Risk*, 137 U. S. 300, 308, 11 Sup. Ct. 111, 34 L. Ed. 683 (1890), says:

“‘These cases emphasize the distinction between a covenant to pay and one to indemnify, and hold that an action will lie for a breach of a covenant to pay before actual payments by the plaintiff, but not upon a mere covenant of indemnity, until the plaintiff has actually sustained loss or damage.’”

In re Lathrop, Haskins & Co., 216 Fed. 102, 106, 107.

It is thus clear that when a proper application of the law is made to the stipulated and agreed facts, the lower court was in error in refusing the offer of proof as to the cost of the acquisition of the property by the appellee and the amount received at the sale. When the evidence has been correctly received, the result is that the net loss to the appellee is \$415.62.

There is no statutory authority for the regulation relied upon in Conclusion of Law No. 4 (38 C. F. R. (1946), Sec. 4323(e)). That regulation is not consistent with the law as stated in Title 38, U. S. C. A., Section 694(g).

The law (38 U. S. C. A., Sec. 694(g)) states in substance that in the event of default the administrator shall be subrogated to the rights of the holder of the obligation. The exact text is set forth later in this brief. The regulation relied upon by the appellant states in substance that any amounts paid by the administrator on account of the liabilities of any veteran guaranteed or

insured under the provisions of the Act shall constitute a debt owing to the United States by such veteran. Other than a publication in the Federal Register, the appellant can find no authority at all for this regulation. It violates the purpose of the Servicemen's Readjustment Act of 1944.

II.

The Action by the Appellee Is a Proceeding for a Deficiency Judgment and by Reason Thereof Is Barred by the Provisions of Section 580(b) of the Code of Civil Procedure of California.

In Title 38, U. S. C. A., Section 694(g), appears the procedure on default. It states:

"In the event of default in the payment of any loan guaranteed under this subchapter, the holder of the obligation shall notify the administrator who shall thereupon pay to such holder the guaranty not in excess of the pro rata portion of the amount originally guaranteed, and shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty: . . ."

Title 38, U. S. C. A., Secs. 694(g), 636.

The wording is very clear and unambiguous. The administrator shall be subrogated to the rights of the holder of the obligation. "Shall" has been defined to be mandatory and not directory (Cal. Gov. Code, Sec. 14; *Board of Supervisors v. Simpson*, 36 Cal. 2d 671, 676).

"Subrogation" is defined in 23 Cal. Jur., page 917, as follows:

"In its broadest sense, subrogation is the substitution of one person in the place of another, whether as creditor or as the possessor of any other rightful claim, so that he who is substituted succeeds to the

rights of the other in relation to the debt or claim and its rights, remedies or securities. It is 'a sort of assignment by operation of equity,' and grew up out of the doctrine of assignment of causes of action."

23 Cal. Jur., p. 917.

In *Waldrip v. Black*, 74 Cal. 409, 16 Pac. 226, it was held that when a person—not a volunteer—has paid money for which others were responsible, the claim thereby given him on those who were so responsible is clothed with the legal garb with which the contract he has discharged was vested, and he is substituted, to every equitable extent and purpose, in the place of the creditor whose claim he has discharged.

This was apparently the reasoning of Chief Justice Marshall in *Lidderdale v. Robinson*, 2 Brock 159.

In California, at all times mentioned herein, there was in full force and effect Section 580(b) of the Code of Civil Procedure, which section reads as follows:

"No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property."

Code Civ. Proc. Sec. 580(b).

The Findings of Fact reveal that the note and loan was secured by a deed of trust on real property and was made for the purpose of the defendant's purchasing said real property [Finding of Fact No. 3, Tr. of the Rec. p. 10].

The lender would have no cause of action against the purchaser of the real property for a deficiency judg-

ment by reason of Section 580(b) of the Code of Civil Procedure. The Veterans Administrator is subrogated to the rights of the lender. He has no greater right than the lender. The Veterans Administrator, therefore, has no cause of action against the lender, and the motion to dismiss the complaint should have been granted.

An application of Section 580(b) of the Code of Civil Procedure of California has been made and used in Federal bankruptcy courts (see *In re Wilton-Maxfield Management Co.*, 117 F. 2d 913, 914, 915).

Conclusion.

From an examination of the entire record, it is apparent that the lower court has misconstrued the application of the Servicemen's Readjustment Act of 1944, as amended. They have placed the burdens upon the veteran rather than apply the spirit and letter of the Act. Separately, the lower court has erroneously determined that the appellee suffered a loss, and if the action is maintainable at all, which action your appellant respectfully submits is barred by reason of the deficiency judgment prohibition in California and the motion to dismiss should have been granted and the judgment should be reversed.

Respectfully submitted,

ROBERT H. GREEN,

Attorney for Appellant.

